

pmw

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

**WRIT PETITION NO.3123 OF 2014
WITH
CRIMINAL APPLICATION NO. 178 OF 2016**

1. Nirmal Bang Securities Private Limited)
(Formerly M/s. Nirmal Bang))
a private limited company incorporated)
under Companies Act, 1956, Having its)
registered office at 38-B, Khatau Bridge)
2nd Floor, Alkesh Dinesh Mody Marg)

2. Kishore Bang,)
residing at Flat No.501, 5th Floor,)
Hamilton Co. Operative Housing Society,)
Laburnum Road, Gamdevi,)
Mumbai – 7,)
Occupation : Director of Petitioner No.1.)

3. Shri Dilip Bang,)
38B, Khatau Building)
2nd Floor, Alkesh Dinesh Modi Marg)
Fort, Mumbai – 400 001)
Occupation : Director of Petitioner No.1.) ... Petitioners

Versus

State of Maharashtra)
Through)

- | | | |
|-------------------------------------|---|-----------------|
| 1. Mumbai Police, MRA Marg, Mumbai, |) | |
| And |) | |
| 2. Ashok Chaudhry |) | |
| R/A 8/1A, Little Russel Street, |) | |
| Kolkata – 700 071. |) | ... Respondents |

Mr. Satish ManeShinde a/w Mr. Ravichandra Hegde and Ms. Aashni Dalal i/by J. Sagar Associates for the Petitioners.

Mr. K.V. Saste, APP for the Respondent No.1.

Mr. Subhash Jha a/w Ms. Sanjana Pardeshi i/by Law Global Advocate for the Respondent No.2 and for Applicant in APPW/178/2016.

**CORAM : A.S. OKA &
SMT. ANUJA PRABHUDESSAI, JJ.**

DATE ON WHICH SUBMISSIONS WERE HEARD : 16th MARCH, 2017

DATE ON WHICH JUDGMENT IS PRONOUNCED : 5th MAY, 2017

JUDGMENT (PER A.S. OKA, J.)::-

1 By this Petition under Article 226 of the Constitution of India read with Section 482 of the Code of Criminal Procedure, 1973 (for short “Cr.PC”), a prayer is made for quashing the order dated 23rd December, 2013 passed by the learned Additional Metropolitan Magistrate, 47th Court, Esplanade, Mumbai on a complaint filed by the second respondent. By the said order, action under Section 156(3) of the Cr. PC was ordered to be taken. There is also a prayer for quashing the First Information Report (FIR) registered with MRA Marg Police

Station for the offence punishable under Section 409 read with Section 34 of the Indian Penal Code registered on the basis of the impugned order. On 5th February, 2015, Rule was issued and after hearing the learned counsel appearing for the second respondent and the learned APP. An interim order was passed directing that charge sheet shall not be filed without leave of this Court and that no coercive action shall be taken against the petitioners. However, investigation was ordered to be continued. We may note here that on 4th November, 2015 an order was passed by the Additional Chief Metropolitan Magistrate, 38th Court, Ballard Pier, Mumbai which reads thus :-

“ORDER BELOW EXH.1 IN NOTICE NO.40/2015

As I am passing this order just below this notice itself, I need not reproduce its contents.

- 2] Perused the petition and the documents along with. Issue notice to the Investigating Officer that, if the offences of forgery as contended in this notice application are made out, he may take appropriate action in accordance with the provisions of law, in the course of his investigation, and do the needful.”

2 By order dated 16th December, 2015 this Court permitted amendment to be carried out for incorporating a reference to the aforesaid order and accordingly, amendment has been carried out.

3 The second respondent in his complaint stated that he was a Director of a Company SIYA Financial Services Pvt. Ltd. The said company was engaged in the business of trading and investment of shares. In the complaint it was alleged that the first petitioner - Company was formerly known as M/s. Nirmal Bang and the second and third petitioners are the Directors of the first petitioner – Company. It is alleged that the first petitioner – Company is engaged in the business of share trading and is a registered broker of NSE and BSE. The allegation is that in the year 1995, the second and third petitioners along with their deceased brother Nirmal Bang had approached the second respondent and requested him to invest in shares and do trading through them. They represented to the second respondent that they were registered brokers of NSE and BSE and it was represented that it would be profitable for the second respondent to get associated with them. On the basis of the representations made by the second and third petitioners and their deceased brother (Nirmal Bang), the second respondent agreed to invest. According to the case made out in the complaint, the second respondent started investing from the year 1995 and numerous transactions in huge amounts running into Crores of rupees were made. It is alleged that the second and third petitioners along with their brother Nirmal Bang were also the Directors of Bama

Securities Limited. The said Company was also trading in shares. Reliance is placed on contract notes which are annexed to the complaint by way of illustration. It is alleged that on 26th February, 1998 the petitioners had bought on behalf of the second respondent, 1,09,700 shares of BFL Software at the rate of Rs.86/-. A copy of the statement of the said transaction has been annexed as Exhibit – B to the complaint. The second respondent relied upon an entry dated 30th June, 1998 which shows the purchase of 1,09,700 shares of BFL Software on 26th February, 1998. It is alleged that in addition to the aforesaid shares, the petitioners were holding other shares on behalf of the second respondent. Details of the said shares are annexed as Exhibit – C to the Petition.

4 The second respondent stated in the complaint that BFL Software was taken over by a foreign company and therefore, price of the shares of BFL Software Company went up. When the second respondent contacted the petitioners to know the status of his shares which were lying with the petitioners and to discuss about the future course of action in trading, the petitioners showed an indifferent and evasive attitude. It is alleged in the complaint that on 11th October, 1998 the second respondent filed a complaint with the Commissioner of Police at Mumbai a copy of which is annexed as Exhibit-E to the

complaint. The material averments in the complaint are in paragraphs 7 to 11 of the pages 32 and 33 which read thus :-

- “7. The complainant thus decided to put his foot down and demanded the accused to hand over all his shares which the Accused had purchased on his behalf in the course of the trade and which the accused were holding on his behalf. The Accused instead of returning the shares back to the complainant threatened the complainant with dire consequences if he ever demanded my shares from them. The complainant was thus constrained to file a complaint before the Commissioner of Police, Mumbai narrating the facts and requesting for appropriate action as per Law. Annexed hereto and marked as Exhibit E is the copy of the complaint dated 11.10.98 filed before the Commissioner of Police, Mumbai.
8. The matter was sent before the General branch, Crime Branch, C.I.D., Mumbai for investigation. Surprisingly no investigation came to be carried out at the instance of General Branch, Crime Branch, C.I.D., Mumbai and without even registering any crime the Inspector of Police, General branch, Crime Branch, C.I.D., Mumbai wrote a letter to me dated 29.06.99 stating that no action was feasible in the matter and that I may redress my grievances in arbitration before Board of Bombay Stock Exchange or National Stock Exchange. Annexed hereto and marked as Exhibit F is the copy of the letter dated 29.06.99 of the Inspector of Police, General branch, Crime Branch, C.I.D., Mumbai. Aggrieved by the approach of the Inspector of Police, General branch, Crime Branch, C.I.D., Mumbai, the complainant pursued the matter with higher officers and made various complaints to them. Annexed hereto and marked as Exhibit G Colly are the copies of the complaints.
9. The complaint was then being pursued by the Office of the Addl. Commissioner of Police, Economic offences Wing, Mumbai and on 13.04.2010 the complaint was

marked to the Dy. Commissioner of Police, Zone-1, Mumbai for necessary action. Annexed hereto and marked as Exhibit H is the copy of the letter dated 13.04.2010.

10. The matter is of a serious nature and of wide repercussions. The accused above named have together conspired and have committed serious criminal offences and a huge fraud running in crores of rupees. The accused have in connivance with each other and with dishonest intentions, since inception, induced the complainant to part with his hard earned monies by representing him that they would invest the said amount in shares. However, in spite of repeated requests and reminders, the accused have not given delivery of those shares as well and have sold off the said shares and appropriated profits generated to their own use. They were holding the shares in trust for the complainant and being the sub-brokers, they were agents of the complainant. The shares belonging to the Complainant are worth about sixty crores which had been entrusted to the accused above named and which the Accused are holding in their capacity as a broker. The Accused above named have committed the offence of criminal breach of trust under section 409 of the Indian Penal Code.
11. Till date no Crime has been registered in the matter by the Economic Offences Wing despite the matter warranted for a prompt and effective investigation by the Economic Offences Wing as the fraud committed is in crores of rupees.”

5 A prayer was made in the complaint praying that an order under Sub-Section (3) of Section 156 of the Cr.PC be issued directing the concerned officer of Economic Offence Wing to register a crime. The impugned order passed on the complaint reads thus :-

“Complainant is present considering the allegation herein, police is directed to investigate into the matter U/s.156(3) of CRPC and report within (illegible) days.”

6 The learned counsel appearing for the petitioners invited our attention to the complaint dated 11th October, 1998 addressed by the second respondent to the Commissioner of Police. He pointed out that the allegations of cheating and fraud have been made in the said letter only as against the said Nirmal. He pointed out that an enquiry was made into the said complaint addressed to the Commissioner of Police and by a letter dated 29th June, 1990, the Inspector of Police, General Branch, Crime Branch, C.I.D., Mumbai informed the second respondent that no action can be taken on the basis of his complaint and he may redress his grievances by resorting to arbitration proceedings. He pointed out that on 25th September, 2002 another complaint was addressed by the second respondent to the Joint Commissioner of Police, Mumbai. In the said complaint, he urged that the second and the third petitioners threatened to kill him on the same day. He pointed out that thereafter the second respondent kept quiet and only on 22nd March, 2010 he addressed a letter to the Joint Commissioner of Police-Crimes alleging cheating and threatening by the second and third petitioners by describing them as Bang Brothers of M/s. Nirmal Bang. He pointed out that on 13th April, 2010 the office of

the Additional Commissioner of Police, Economic Offence Wing forwarded the complaint by the second respondent to the Deputy Commissioner of Police. He pointed out a letter addressed by the second petitioner on 28th November, 2002 to the Joint Commissioner of Police. He pointed out that the complaint was belatedly filed on 5th June, 2013. He urged that the complaint is completely malafide. He relied upon several decisions of the Apex Court and this Court. He relied upon a decision of the Apex Court in the case of *Priyanka Srivastava and another Vs. State of U.P and Another*¹. He submitted that apart from the fact that the averments regarding compliance with Sub-Section (3) of Section 154 of the Cr.PC are not made, the order under Section 156(3) appears to have been passed in mechanical manner as the said order runs into only one sentence which does not contain any reasons. He submitted that the aspect of delay has not been considered. He also invited our attention to the decision of the Apex Court in the case of *M/s Thermax Ltd.& Ors. vs. K.M.Johny & Ors*². He also relied upon well-known decision of the Apex Court in the case of *State Of Haryana And Ors vs Choudhary Bhajan Lal And Ors*.³ He also relied upon a decision of the Apex Court in the case of *Ramdev Food Products Private Limited vs. State Of Gujarat*⁴. He also relied upon well-known decision of the Apex

1 (2015) 6 SCC 287

2 (2011) 13 SCC 412

3 Suppl(1) SCC 335

4 (2015) 6 SCC 439

Court in the case of *Mehmood Ul Rehman and Ors. Vs. Khazir Mohammad Tunda and Ors*⁵. He submitted that the order on the basis of which the FIR is registered shows complete non-application of mind. He urged that application of mind is not reflected from the said order. Hence, the order and the FIR registered on the basis of the order be quashed and set aside.

7 The learned counsel appearing for the second respondent has made detailed submissions. He submitted that the view that order passed under Sub-Section (3) of Section 156 of Cr.PC must contain reasons in brief needs reconsideration. He relied upon a decision of the Apex Court of three Hon'ble Judges in the case of *Devarapalli Lakshminarayana Reddy and Ors. Vs. V. Narayana Reddy and Ors.*⁶ He submitted that an order made under Sub-Section (3) of Section 156 is in the nature of a peremptory reminder or intimation to the Police to exercise their plenary power of investigation. He submitted that therefore, the learned Magistrate is not expected to apply his mind in detail and pass a reasoned order. He relied upon a decision of the Apex Court in the case of *Mohindro Vs. State of Punjab and Ors.*⁷ He also relied upon the decision of the Apex Court in the case of *Lalita Kumari*

5 (2015) 12 SCC 420

6 (1976) 3 SCC 252

7 (2001) 9 SCC 581

*Vs. State of Uttar Pradesh and Others*⁸. He submitted that once a case of commission of a cognizable offence is made out, the police have no option but to register the FIR and that is the reason why an order under Sub-Section (3) of Section 156 is in the nature of a reminder. He submitted that the subsequent decisions of the Apex Court in the case of *Priyanka Srivastava, Ramdev Food Products and Mehmood Ul Rehman* do not consider the law laid down in the decision of the larger Bench in the case of *Devarapalli Reddy*. He relied upon a decision of the learned Single Judge of Andhra Pradesh High Court in the case of *Raman Srikanth vs State of Telangana*⁹. He submitted that even assuming that the impugned order passed by the learned Magistrate is not proper, on that ground, the FIR cannot be quashed especially when a prima facie case of commission of cognizable offence is made out. He also relied upon a recent decision of the Apex Court in the case of *HDFC Securities Limited and Ors. Vs. State of Maharashtra and Anr.*¹⁰ He submitted that as held by the Apex Court, an order under Sub-Section (3) of Section 156 requiring investigation by the police cannot be said to have caused any injury of irrevocable nature. He submitted that the stage of cognizance would arise only after a final report is submitted by the police and therefore, as held by the Apex Court, this Petition is

8 2014 (2) SCC 1

9 Manu /A.P./0385/2015

10 2011 SCC Online Bom 1986

premature. He submitted that powers under Section 482 of the Cr.PC will have to be used very sparingly. He submitted that at this stage, the power under Section 482 cannot be exercised and investigation must proceed.

8 He invited our attention to the decision of the Apex Court in the case of *Rajesh Bajaj vs NCT Of Delhi And Others*¹¹. He submitted that complaint cannot be quashed only on the ground that ingredients of the offences are not made out. He pointed out that there is a material on record to show that business of M/s. Nirmal Bang and Nirmal Bang Securities Pvt. Ltd. was controlled by the entire family of Nirmal Bang as well as the second and third petitioners who are his brothers. He submitted that there are two letters on record to show that Nirmal Bang Securities Private Limited delivered the shares to the second respondent which show that assets and liabilities of M/s. Nirmal Bang were taken over by M/s. Nirmal Bang Securities Pvt. Ltd. on its incorporation. He invited our attention to various letters placed on record and the statements of account. He submitted that there is enough material to show complicity of the second and third petitioners. He submitted that the delay by itself is no ground to quash the proceedings.

11 (1999) 3 SCC 259

9 We have given careful consideration to the submissions. As far as the provision of Sub-Section (3) of Section 156 is concerned, the law is summarised by this Bench in the case of *Sayed Anwar Ahmed and another Vs. State of Maharashtra and another* in Criminal Writ Petition No.924 of 2016 decided on 27th and 28th February, 2017. This Court has extensively considered the decision of the Apex Court in the case of *Priyanka Srivastava* as well as *Lalita Kumari Vs. State of Uttar Pradesh*. The law has been summarised in paragraph 25 of the said decision which reads thus :-

“25. To summarise,

(a) While dealing with a Complaint seeking an action under Sub-Section (3) of Section 156 of Cr.PC, the learned Magistrate cannot act mechanically. He is required to apply his mind to the contents of the Complaint and the documents produced along with the Complaint ;

(b) An Order passed on the said Complaint must record reasons in brief which should indicate application of mind by the Magistrate. However, it not necessary to record detailed reasons;

(c) The power under Sub-Section (3) of Section 156 is discretionary. Only because on plain reading of the Complaint, a case of commission of cognizable offence is made out, an Order of investigation should not be

mechanically passed. In a given case, the learned Magistrate can go in to the issue of the veracity of the allegations made in the Complaint. The learned Magistrate must also consider the other relevant aspects such as the inordinate delay on the part of the Complainant. The nature of the transaction and pendency of civil proceedings on the subject are also relevant considerations;

(d) When a Complaint seeking an action under Sub-Section (3) of Section 156 is brought before the learned Metropolitan Magistrate or the learned Judicial Magistrate, it must be accompanied by an affidavit in support as contemplated by the decision of the Apex Court in *Priyanka Srivastava*. The affidavit must substantially comply with the requirements set out in Chapter VII of the Criminal Manual and especially paragraphs 5 and 8 which are quoted above; and

(e) Necessary averments recording compliance with Sub-Sections (1) and (3) of Section 154 of the CrPC should be incorporated with material particulars. Moreover, the documents in support of the said averments must be filed on record.”

10 The submission of the learned counsel appearing for the second respondent is that the decision of a Bench of the Apex Court of three Hon'ble Judges in the case of *Devarapalli Reddy* holds that an

order made under Sub-Section (3) of Section 156 is in the nature of a reminder or intimation to police to exercise their plenary power of investigation under Section 156(1). We have perused the said judgment. Firstly, we must mention here that in the case of *Priyanka Srivastava*, the Apex Court has considered the decision of the three Judge Bench in the case of *Devarapalli*. In fact, relevant part of paragraph 17 of the said decision which is relied upon by the second respondent is quoted in the said decision. Paragraph 17 of the said decision in the case of *Devrapalli Reddy* is relevant. It reads thus :-

"17. Section 156(3) occurs in Chapter XII, under the caption: "Information to the Police and their powers to investigate"; while s.202 is in Chapter XV which bears the heading "Of complaints to Magistrates". The power It order police investigation under s.156(3) is different from the power to direct investigation conferred by s.202(1). The two operate in distinct spheres at different stages. The first is exercisable at the pre cognizance stage, the second at the post-cognizance stage when the Magistrate is in seisin of the case. "That is to say in the case of a complaint regarding the commission of a cognizable offence, the power under s.156(3) can be invoked by the Magistrate before he takes cognizance of the offence under s.190(1)(a). But if he once takes such cognizance and embarks upon the procedure embodied in Chapter XV, he is not competent to switch back to the pre-cognizance stage and avail of s.156(3). **It may be noted further that an order made under sub-section (3) of s.156, is in the nature of a peremptory reminder or intimation to the police to exercise their plenary powers of investigation under s.156(1). Such an investigation embraces the entire continuous process which begins with the collection of evidence under s.156 and ends with a report or chargesheet under s.173.** On the other hand s.202 comes in at a stage when some evidence has been

collected by the Magistrate in proceedings under Chapter XV, but the same is deemed insufficient to take a decision as to the next step in the prescribed procedure. In such a situation, the Magistrate is empowered under s.202 to direct within the limits circumscribed by that section, an investigation "for the purpose of deciding whether or not there is sufficient ground for proceeding ". Thus the object of an investigation under s.202 is not to initiate a fresh case on police report but to assist the Magistrate in completing proceedings already instituted upon a complaint before him."

(emphasis added)

We must note here that the portion highlighted above has been quoted by the Apex Court in the case of *Priyanka Srivastava*. The issue in the said decision in the case of *Devarapalli* was whether a Magistrate who receives a complaint disclosing an offence exclusively triable by the Court of Session, is debarred from sending the same to the police for investigation under Sub-Section (3) of Section 156. If paragraphs 18 and 19 of the said decision are perused, it is apparent that the issue regarding the manner of exercise of the power under Sub-Section (3) of Section 156 did not arise for consideration before the Apex Court. The issue whether an order under Sub-Section (3) of Section 156 must contain reasons did not fall for consideration of the Apex Court. The Apex Court was considering the matter in a different context as indicated by paragraphs 18 and 19 which read thus :-

“18. In the instant case the Magistrate did not apply his mind to the complaint for deciding whether or not there is sufficient ground for proceeding; but only for ordering an investigation under s.156(3). He did not bring into motion the machinery of Chapter XV. He did not examine the complaint or his witnesses under s.200, Cr.P.C., which is the first step in the procedure prescribed under that Chapter. The question of taking the next step of that procedure envisaged in s.202 did not arise. Instead of taking cognizance of the offence he has., in the exercise of his discretion, sent the complaint for investigation by police under s.156.

19. This being the position, s. 202(1), 1st Proviso was not attracted. A Indeed, it is not necessary for the decision of this case to express any final opinion on the ambit and scope of the 1st Proviso to S.202(1) of the Code of 1973. Suffice it to say, the stage at which S.202 could become operative was never reached in this case. We have therefore in keeping with the well-established practice of the Court, decided only that much which was essential for the disposal of this appeal, and no more.”

11 The Apex Court held that the first proviso of Sub-Section (1) of Section 202 was not attracted as the stage at which the first proviso could become operative had never reached as before examining the complainant under Section 200 of the Cr.P.C, the learned Magistrate ordered investigation under Sub-Section (3) of Section 156. Therefore, the decision in the case of *Devarapalli*, in our view, is not an authority for the proposition that the learned Magistrate is not required to record any reasons while passing an order under Sub-Section (3) of Section 156 of Cr.P.C. The Apex Court in the case of *Priyanka Srivastava*, after

considering what is held in paragraph 17 of the decision of the larger

Bench in the case of *Devarapalli*, in paragraph Nos.27 to 30 held thus :-

“27. Regard being had to the aforesaid enunciation of law, it **needs to be reiterated that the learned Magistrate has to remain vigilant with regard to the allegations made and the nature of allegations and not to issue directions without proper application of mind. He has also to bear in mind that sending the matter would be conducive to justice and then he may pass the requisite order.** The present is a case where the accused persons are serving in high positions in the Bank. We are absolutely conscious that the position does not matter, for nobody is above the law. But, the learned Magistrate should take note of the allegations in entirety, the date of incident and whether any cognizable case is remotely made out. It is also to be noted that when a borrower of the financial institution covered under the SARFAESI Act, invokes the jurisdiction under Section 156(3) CrPC and also there is a separate procedure under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, an attitude of more care, caution and circumspection has to be adhered to.

28. **Issuing a direction stating “as per the application” to lodge an FIR creates a very unhealthy situation in society and also reflects the erroneous approach of the learned Magistrate.** It also encourages unscrupulous and unprincipled litigants, like Respondent 3, namely, Prakash Kumar Bajaj, to take adventurous steps with courts to bring the financial institutions on their knees. As the factual exposition would reveal, Respondent 3 had prosecuted the earlier authorities and after the matter is dealt with by the High Court in a writ petition recording a settlement, he does not withdraw the criminal case and waits for some kind of situation where he can take vengeance as if he is the emperor of all he surveys. It is interesting to note that during the tenure of Appellant 1, who is presently occupying the position of Vice-President, neither was the loan taken, nor was the default made, nor was any action under the SARFAESI Act taken. However, the

action under the SARFAESI Act was taken on the second time at the instance of the present Appellant 1. We are only stating about the devilish design of Respondent 3 to harass the appellants with the sole intent to avoid the payment of loan. When a citizen avails a loan from a financial institution, it is his obligation to pay back and not play truant or for that matter play possum. As we have noticed, he has been able to do such adventurous acts as he has the embedded conviction that he will not be taken to task because an application under Section 156(3) CrPC is a simple application to the court for issue of a direction to the investigating agency. We have been apprised that a carbon copy of a document is filed to show the compliance with Section 154(3), indicating it has been sent to the Superintendent of Police concerned.

29. **At this stage it is seemly to state that power under Section 156(3) warrants application of judicial mind. A court of law is involved. It is not the police taking steps at the stage of Section 154 of the Code. A litigant at his own whim cannot invoke the authority of the Magistrate. A principled and really grieved citizen with clean hands must have free access to invoke the said power. It protects the citizens but when pervert litigations takes this route to harass their fellow citizens, efforts are to be made to scuttle and curb the same.**
30. In our considered opinion, a stage has come in this country where Section 156(3) CrPC applications are to be supported by an affidavit duly sworn by the applicant who seeks the invocation of the jurisdiction of the Magistrate. That apart, in an appropriate case, the learned Magistrate would be well advised to verify the truth and also can verify the veracity of the allegations. This affidavit can make the applicant more responsible. We are compelled to say so as such kind of applications are being filed in a routine manner without taking any responsibility whatsoever only to harass certain persons. That apart, it becomes more disturbing and alarming when one tries to pick up people who are passing orders under a statutory provision which can be challenged under the framework of the said Act or

under Article 226 of the Constitution of India. But it cannot be done to take undue advantage in a criminal court as if somebody is determined to settle the scores.”

(emphasis added)

12 Now, we come to the decision of the learned Single Judge of Andhra Pradesh High Court in the case of *Raman Srikanth*. He held that failure to pass a speaking order while forwarding the complaint under Sub-Section (3) of Section 156 is not a justifiable ground to quash the proceedings. The view taken is completely contrary to the catena of the decisions of the Apex Court including the decision in the case of *Priyanka Srivastava*. In the case of *Ramdev Food Products*, in paragraph 20, the Apex Court quoted with approval its own decision in the case of *Anil Kumar & Ors vs M.K Aiyappa & Anr.*¹² In paragraphs 19 and 20, the Apex Court held thus :-

19. Thus, this Court has laid down that while prompt registration of FIR is mandatory, checks and balances on power of police are equally important. Power of arrest or of investigation is not mechanical. It requires application of mind in the manner provided. Existence of power and its exercise are different. Delicate balance had to be maintained between the interest of society and liberty of an individual. Commercial offences have been put in the category of cases where FIR may not be warranted without enquiry.

20. **It has been held, for the same reasons, that direction by the Magistrate for investigation under Section 156(3) cannot be given mechanically.** In *Anil Kumar vs. M.K. Aiyappa* [5], it was observed :

"11. The scope of Section 156(3) CrPC came up for

12 2013(10) SCC 705

consideration before this Court in several cases. This Court in *Maksud Saiyed* case [(2008) 5 SCC 668] examined the requirement of the application of mind by the Magistrate before exercising jurisdiction under Section 156(3) and **held that where jurisdiction is exercised on a complaint filed in terms of Section 156(3) or Section 200 CrPC, the Magistrate is required to apply his mind, in such a case, the Special Judge/Magistrate cannot refer the matter under Section 156(3) against a public servant without a valid sanction order. The application of mind by the Magistrate should be reflected in the order. The mere statement that he has gone through the complaint, documents and heard the complainant, as such, as reflected in the order, will not be sufficient. After going through the complaint, documents and hearing the complainant, what weighed with the Magistrate to order investigation under Section 156(3) CrPC, should be reflected in the order, though a detailed expression of his views is neither required nor warranted. We have already extracted the order passed by the learned Special Judge which, in our view, has stated no reasons for ordering investigation."**

The above observations apply to category of cases mentioned in Para 120.6 in *Lalita Kumari* (supra)."

(emphasis added)

Ultimately in paragraph No.22.1, the Apex Court held that the direction under Sub-Section (3) of Section 156 is to be issued only after application of mind by the learned Magistrate. Even in this case, the Apex Court has considered the decision in the case of *Devarapalli*.

13 The learned counsel appearing for the second respondent relied upon a decision of the Apex Court in the case of *Srinivas Gundluri*

*and Ors. Vs. Sepco Electric Power Construction Corporation and Ors.*¹³.

The said decision considers the law laid down in the case of *Devarapalli Reddy*. Even in the said decision, the issue regarding the manner in which the power under Sub-Section (3) of Section 156 should be exercised was not considered by the Apex Court. The Apex Court extensively considered the question “what is meant by taking cognizance of offence”.

14 Now, we turn to the decision of the Apex Court in the case of *HDFC Securities Limited*. In the said case there was an order passed under Sub-Section (3) of Section 156 of Cr.P.C on the basis of which FIR was registered. Writ Petitions were filed by the appellants before the Apex Court for quashing FIR. The Writ Petitions were dismissed by the High Court by holding the same as premature. The order passed by the learned Magistrate under Sub-section (3) of Section 156 of Cr.P.C is quoted in paragraph 12 which records reasons in brief. The order shows that the learned Magistrate had applied his mind to the contents of the complaint and came to the conclusion that the complaint disclosed commission of cognizable offence. The order was not made only on this ground. The learned Magistrate recorded a satisfaction that considering the nature of the offence, it needs to be sent to the police for investigation under Sub-Section (3) of Section 156. The order records

13 (2010) 8 SCC 206

that he has even perused the documents filed along with the complaint. Therefore, this was not a case where a single line order was passed ordering investigation. This was a case where the order under Sub-Section (3) of Section 156 disclosed that the learned Magistrate had applied his mind to the complaint. It is in the facts of the case before the Apex Court that the observations were made in paragraph 27 that the Petitions filed before the High Court were filed at premature stage. We are of the view, if the order made under Sub-Section (3) of Section 156 is illegal, the FIR registered on the basis of the order can be quashed to avoid abuse of process of law.

15 As far as the decision in the case of *Sajjan Kumar Vs. Central Bureau Investigation*¹⁴ relied upon by the learned counsel appearing for the second respondent is concerned, the same here does not deal with the gross delay in filing a complaint. It deals with the effect of the inordinate delay in the proceedings. The decision in the case of *Mohindro* does not lay down any proposition of law which will assist the second Respondent.

16 Now, we turn to the factual aspects of the case. As stated earlier, the impugned order runs into a single sentence which on the face of it does not disclose any application of mind by the learned Judge

14 (2010) 9 SCC 368

to the facts stated in the complaint. The complaint was filed on 5th June, 2013. We have perused the annexures to the complaint. The first complaint filed by the second respondent was on 11th October, 1998 addressed to the Commissioner of Police. The second respondent stated therein that he has been cheated and frauded by the said Nirmal Bang over a deal in shares at Mumbai. There is no reference to second and third petitioners in the said complaint. There is no allegation made against them. By a letter dated 29th June, 1999, the Inspector of Police of General Branch, Crime Branch, C.I.D, Mumbai informed the second respondent that no action is feasible on the basis of his complaint and therefore, he may take recourse to arbitration before the Stock Exchange. The second respondent did not take recourse to any proceedings after receiving communication dated 29th June, 1999. He kept mum and after three years and three months, on 25th September, 2002, he lodged another complaint with the Joint Commissioner of Police, Mumbai. In that complaint, he made allegations against the second and third petitioners who were the brothers of Nirmal. Serious allegation was made in the said complaint that on 25th September, 2002 when the second respondent met the second and third petitioners near Oberoi Tower at 7.00 pm, three unknown persons joined the second and third petitioners and all of them threatened him by telling him that if he demands his dues, he would be killed. It is not his case that on 25th

September, 2002 he immediately went to a Police Station and tried to lodge a complaint. After filing the said complaint, the second respondent did nothing for more than 7 years. On 22nd March, 2010 he filed a complaint with Shri Rakesh Maria, Joint Commissioner of Police in which he stated that he was to receive shares worth more than 60 Crores from Bang brothers (second and third petitioners). He alleged that for past six months they were promising him to either deliver the shares or to make payment. He alleged that for past six months, the second and third petitioners were calling him on landline and threatening him. Here again it is not the case of the second respondent that during the span of six months he filed any complaint with police.

17 From the letter dated 13th April, 2010 forwarded by the office of the Additional Commissioner of Police, Economic Offences Wing, CID, Mumbai to the Deputy Commissioner of Police, Zone – I, it appears that complaint made by the second respondent was forwarded to the said officer.

18 In the complaint filed before the learned Metropolitan Magistrate on which the impugned order has been passed, the second respondent has not stated as to what steps were taken by him from 29th June, 1999 to 25th September, 2002. There is no explanation for further

inaction till 22nd March, 2010. There is no explanation as to why he waited till June 2013 to file the complaint on which the impugned order has been passed. There is absolutely no reason stated for this inaction and delay from April, 2010 to June, 2013. There is a gross unexplained delay in approaching the Court.

19 If averments made in the complaint are taken as correct, on 26th February 1998, the accused bought on behalf of the second respondent 1,09,700 shares of BFL. It is not the case made out in the complaint that there were any further transactions after 1998 between the second respondent and the petitioners. It is not his case that after the year 1998 till the year 2013, any further investment was made by him with the Petitioners.

20 Thus, on 11th October, 1998 for the first time, the second respondent addressed a complaint to the Commissioner of Police, Mumbai in which the allegations were made only against Nirmal. On 29th June, 1999 he was informed that no action can be taken on the basis of the complaint and he should take recourse to arbitration. It is not the case of the second respondent that he took any further steps till 25th September, 2002. He did not approach either the Court of law or higher police officers. As stated earlier, for the alleged incident of 25th

September, 2002, the second respondent addressed a written complaint to the Joint Commissioner of Police, Mumbai without approaching the concerned Police Station. Thereafter, for a period of seven years or more, the second respondent took no steps till 22nd March, 2010 when he addressed a complaint to Shri Rakesh Maria, Joint Commissioner of Police. According to the case of the second respondent, the complaint was forwarded to the Deputy Commissioner of Police, Zone – I on 13th April, 2010. A copy of the communication to that effect was forwarded even to the second respondent which is annexed to the complaint. It is not the case made out in the complaint that thereafter the second respondent complained about the delay in investigation or that he approached any higher police officials. Three years and two months thereafter, he filed the complaint before the learned Magistrate. Going by the averments made in the complaint, after 26th February, 1998 even according to the case of the second respondent, there was no transaction between him and the accused in the sense that it is not the case that thereafter any shares or securities were purchased by the petitioners on his behalf. Thus, by filing the complaint before the learned Magistrate in June 2013, an action under Sub-Section (3) of Section 156 was sought on the basis of the alleged transactions with the said Nirmal upto the year 1998 and the alleged incident of 25th September, 2002. Thus, there was a gross and unexplained delay of

several years in filing the complaint. As held by this Court in the case of *Sayed Anwar Ahmed and another*, such a gross delay was a factor which the learned Magistrate ought to have considered. The learned Magistrate passed a cryptic impugned order on 23rd December, 2013 on the basis of which the impugned FIR was registered on 23th June, 2014.

21 We are not entering into the controversy whether the allegations made in against the second and third petitioners were an afterthought. Setting criminal law in motion after such a long lapse of time shows the malafide intention of the second respondent. For the transactions of 1998, he did not take any steps to avail of proper remedy. The action of filing the complaint in June, 2013 is nothing but an abuse of process of law.

22 On the basis of the complaint filed in 1998 by the second respondent, the Police had declined to take any action by informing the second respondent accordingly by a letter dated 29th June, 1999. But for the impugned order passed by the learned Magistrate, the Police could not have registered the FIR. Therefore, as the impugned order is completely illegal, the FIR registered on the basis of the same in the year 2014 deserves to be quashed. Even by ignoring the illegality associated with the impugned order of the learned Magistrate, at such a

belated stage, the prosecution of the petitioners will be nothing but an abuse of process of law.

23 It appears that an application was made by the second respondent on 31st October, 2005 before the Metropolitan Magistrate contending that apart from Section 409 of the IPC, the offences under the other Sections were also attracted. On the said application, the learned Judge passed an order dated 4th November, 2015 issuing notice to the Investigating Officer by observing that if the offence of forgery as contended in the application are made out, the Investigating Officer may take appropriate action in accordance with law in the course of the investigation. On the face of it, the said order was unwarranted and illegal and the learned Magistrate had no power to issue any such direction during the course of investigation to the police officer.

24 We make it very clear that we are not adjudicating upon the rights and liabilities of the parties.

25 Accordingly, the Petition must succeed and we pass the following order :-

ORDER

(i) Rule is made absolute in terms of prayer clause (a) which reads thus :-

“(a) be pleased to issue a writ, order or direction under Article 226 and Article 227 of the Constitution of India and Section 482 of the Criminal Procedure Code, 1973 quashing the Impugned Order dated 23rd December, 2013 and the Criminal Complaint dated June 5, 2013 and FIR dated 23/6/2014 against the Petitioners which are filed under various provisions of the IPC.”

(ii) Criminal Application does not survive and the same is accordingly disposed of;

(iii) All concerned to act upon an authenticated copy of this order.

(SMT. ANUJA PRABHUDESSAI, J)

(A.S. OKA, J)